



BellSouth Telecommunications, Inc.

333 Commerce Street

Suite 2101

Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

February 28, 2003

03 FEB 28 PM 2 56  
Joelle J. Phillips  
Attorney  
615 214 6311  
Fax 615 214 7406  
TN REGULATORY AUTHORITY  
DOCKET ROOM

VIA HAND DELIVERY

Hon. Sara Kyle, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *MCImetro Access Transmission Services, LLC and Brooks Fiber  
Communications of Tennessee, Inc. Complaint Against BellSouth for  
Overcharging for High Capacity Circuits*

Docket No. 03-00145

Dear Chairman Kyle:

Enclosed are fourteen (14) copies of BellSouth Telecommunications, Inc.'s Unopposed Motion for Extension of Time. I have verified with Mr. John Hastings, counsel for MCI, that his client has no opposition to this Motion.

A copy of this letter has been provided to Mr. Hastings.

Very truly yours,

Guy M. Hicks

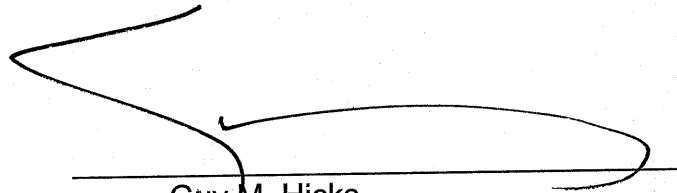
GMH:ls

cc: Mr. John Hastings

**CERTIFICATE OF SERVICE**

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Motion for Extension of Time on the following via United States Mail, on the 28<sup>th</sup> day of February 2003:

John Hastings, Esq.  
414 Union Street; Ste. 1600  
Nashville, TN 37219-8062



Guy M. Hicks

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. Complaint Against BellSouth for Overcharging for High Capacity Circuits*

Docket No. 03-00145

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
UNOPPOSED MOTION FOR EXTENSION OF TIME**

BellSouth Telecommunications, Inc. ("BellSouth"), respectfully requests that the Tennessee Regulatory Authority ("Authority") grant it an extension of time in which to file its answer and any counterclaims. In support of this motion, BellSouth states the following:

1. On February 19, 2003, MCImetro Access Transmission Services LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively, "MCI") filed their Complaint against BellSouth.

2. BellSouth seeks to assert certain counterclaims or claims in setoff against MCI; however, MCI is an affiliate company of WorldCom, Inc. ("WorldCom"). On July 21, 2002 WorldCom and certain of its affiliates filed a voluntary petition for relief under Chapter 11 of the United State Bankruptcy Code, 11 U.S.C. § 101-1330 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

3. In order to assert its counterclaims or claims in setoff against MCI in this docket, BellSouth must first obtain a ruling from the Bankruptcy Court. On February 18, 2003, BellSouth filed a motion to lift the bankruptcy stay with respect to certain counterclaims or claims in setoff. A copy of BellSouth's Motion is attached as Exhibit A.<sup>1</sup>

4. BellSouth has consulted with MCI's counsel, and MCI has consented to this Motion for Extension of Time. Specifically, MCI has no objection to BellSouth having an extension of time to file its response to the Complaint in this docket until two weeks after the Bankruptcy Court issues a ruling on BellSouth's motion to lift the bankruptcy stay.

5. There would be no prejudice to the parties by delaying the time for BellSouth to file its response in this case until two weeks after the Bankruptcy Court issues a ruling to lift the bankruptcy stay. However, if BellSouth is not permitted an extension to file its response, it would not be permitted to assert any counterclaims or claims in setoff in this docket because of the bankruptcy stay, which would prejudice BellSouth.

**WHEREFORE,** for the foregoing reasons, BellSouth respectfully requests that the Authority grant it an extension of time until two weeks

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<sup>1</sup> The exhibits to BellSouth's Motion in the Bankruptcy Court are not attached because they are somewhat voluminous and MCI already has copies.

after the Bankruptcy Court issues a ruling on BellSouth's motion to lift the  
bankruptcy stay in which to file its response to MCI's Complaint.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks  
Joelle J. Phillips  
333 Commerce Street, Suite 2101  
Nashville, TN 372013300  
615/214-6301

R. Douglas Lackey  
Meredith May  
675 W. Peachtree St., NE, Suite 4300  
Atlanta, GA 30375

Hearing Date: March 11, 2003 at 10:00 a.m.  
Objection Deadline: March 6, 2003 at 4:00 p.m.

KILPATRICK STOCKTON LLP  
Paul M. Rosenblatt (PR-6300)  
Robbin S. Rahman (GA 592151)  
1100 Peachtree Street, Suite 2800  
Atlanta, Georgia 30309  
(404) 815-6321  
(404) 541-3373 (fax)

COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, INC.

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	
	:	Chapter 11
WORLDCOM, INC., <u>et al.</u> ,	:	Case No. 02-13533 (AJG)
	:	
	:	(Jointly Administered)
Debtor.	:	
-----	X	

**MOTION OF BELL SOUTH TELECOMMUNICATIONS, INC.  
FOR RELIEF FROM THE AUTOMATIC STAY OR ALTERNATIVE RELIEF**

BellSouth Telecommunications, Inc. ("BellSouth"), respectfully requests that the Court enter an Order: (a) granting BellSouth relief from the automatic stay, pursuant to 11 U.S.C. § 362(d)(1), to assert a limited right of setoff, pursuant to 11 U.S.C. § 553(a), in actions commenced post-petition by the Debtors against BellSouth before various state PSCs (the "WorldCom Actions"); and, in furtherance thereof, (b) granting BellSouth relief from the automatic stay, pursuant to 11 U.S.C. § 362(d)(1), to (i) allow BellSouth to commence or continue with certain actions against WorldCom, Inc. before various state public service

commissions (“PSCs”) (collectively, the “BellSouth Actions”) or (ii) to assert the claims asserted in the BellSouth Actions as counterclaims (the “Counterclaims”) in the WorldCom Actions; or in the alternative, (c) conditioning the continuation of the stay on agreement by the Debtors to a stipulation to refrain from executing on any judgment or award entered in the Debtors’ favor in the WorldCom Actions until BellSouth’s setoff rights have been determined by a final order, including the resolution of BellSouth’s claims. In support of this Motion, BellSouth respectfully represents as follows:

### **PRELIMINARY STATEMENT**

1. In this Motion, BellSouth seeks relief from the automatic stay to assert its valid rights of setoff, as specifically recognized by 11 U.S.C. § 553(a). These rights, as applicable to this Motion, relate only to (a) amounts that are fully liquidated and indisputably owed to BellSouth by the Debtors as set forth in the Debtors’ Schedule of Liabilities and (b) amounts that may be liquidated in the BellSouth Actions but have not yet been liquidated due to the filing of these cases. Prior to the filing of the WorldCom Actions in December 2002, BellSouth was fully prepared to negotiate a resolution of the setoff issues between the Debtors and WorldCom, as contemplated by the Court’s Adequate Assurance Order (as defined herein).

2. However, BellSouth now faces the very real prospect of losing its setoff rights without ever having its “day in court”. Specifically, the Debtors’ commenced the WorldCom Actions in December 2002 and voluntarily chose to

liquidate certain pre-petition and post-petition claims against BellSouth outside of the Bankruptcy Court. Simultaneously, however, the Debtors have invoked the powers of the automatic stay to prevent BellSouth from protecting itself from irreparable harm by preventing BellSouth from commencing or continuing with the BellSouth Actions or asserting the Counterclaims in the WorldCom Actions. Indeed, if the Debtor Parties receive an award in the WorldCom Actions and are permitted to execute upon such award, BellSouth will be in a race with the Debtor Parties to liquidate its claims and obtain setoff rights prior to the Debtor Parties enforcing the award. Accordingly, as described below, BellSouth is seeking relief at this time only to the extent necessary to ensure that it does not lose rights that it had as of the filing of these cases without first obtaining a judicial determination of the validity of such rights.

### **Background**

3. On July 21, 2003 (the "Petition Date"), WorldCom, Inc. and various related entities (collectively, the "Debtors"), filed for relief under Chapter 11 of the United States Bankruptcy Code. The Debtors continue to operate their business and manage their assets as debtors-in-possession.

4. This Court has jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.



### **The Parties**

5. BellSouth and the Debtors are party to a varying array of agreements pursuant to which BellSouth and the Debtors buy and sell various telecommunications and related services to and from each other (collectively, the "Services").

6. Certain of the Services are provided pursuant to agreements known as interconnection agreements (the "Interconnection Agreements"). The Interconnection Agreements, in general, provide for the mutual passing of traffic between or through BellSouth's and the Debtors' networks, allowing customers of one of the networks to call users served by or through the other network as well as allowing for the purchase of certain services available from BellSouth. The Interconnection Agreements contain their own terms, as well as allow for the ordering of various Services provided by tariff (as explained in the following paragraph). The Interconnection Agreements are signed on a state-by-state basis and various Debtors have entered into Interconnection Agreements with BellSouth in each state. Thus, BellSouth and several of the Debtors are party to over twenty different Interconnection Agreements, although the terms of each Interconnection Agreement are similar or nearly identical.

7. Certain other Services are provided pursuant to agreements based on tariffs. A tariff is a public document filed with and approved by the Federal Communications Commission or a state PSC outlining the rates and terms for the services covered by that tariff.

8. The Interconnection Agreements can be viewed at “[http://cpr.bellsouth.com/clec/docs/all\\_states/index7.html](http://cpr.bellsouth.com/clec/docs/all_states/index7.html)”. Each Interconnection Agreement generally is in excess of 700 pages in length. BellSouth’s tariffs can be viewed at “<http://cpr.bellsouth.com/index2.html>” and equally are as voluminous.

### **The BellSouth Actions**

9. Prior to the Petition Date, BellSouth prepared to file the BellSouth Actions before various state PSCs in each of the nine states in BellSouth’s regulated operating region (the “Operating Region”). The nine states in the Operating Region are Florida, Georgia, Alabama, Mississippi, North Carolina, South Carolina, Tennessee, Kentucky and Louisiana. Prior to the Petition Date, BellSouth was able to commence the following four BellSouth Actions: (a) on May 9, 2002, BellSouth filed a complaint against WorldCom, Inc. with the Public Service Commission of South Carolina, Docket No. 2002 166-C. See Exhibit “A” attached hereto; (b) on May 10, 2002, BellSouth filed a complaint against WorldCom, Inc. with the Alabama Public Service Commission, Docket No. 28565. See Exhibit “B” attached hereto; (c) on May 13, 2002, BellSouth filed a complaint against WorldCom, Inc. with the Georgia Public Service Commission, Docket No. 15388-U. See Exhibit “C” attached hereto (the “Georgia Complaint”); and (e) on May 16, 2002, BellSouth filed a complaint against WorldCom, Inc. with the Louisiana Public Service Commission, Docket No. 26475. See Exhibit “D” attached hereto. In these four BellSouth Actions, BellSouth asserts, on a current basis, an aggregate amount of \$7 million in claims, exclusive of claims for late-payment charges, against the Debtors.

10. In addition to the four BellSouth Actions that were filed, BellSouth intended to file the BellSouth Actions in the remaining five states in the Operating Region. However, as a result of the filing of these cases and the operation of the automatic stay, BellSouth was not able to do so. In total, the BellSouth Actions (comprised of the four actions that were filed prior to the Petition Date and the five that have not yet been filed) represent, on a current basis, approximately \$30 million in claims, exclusive of claims for late-payment charges, against the Debtors.

11. The BellSouth Actions relate to what is known as "PIU." PIU, or percent interstate usage, is the factor used to allocate billable charges to the correct jurisdiction (interstate or intrastate) whenever the jurisdiction cannot be determined mechanically. This is important because interstate rates are often different from intrastate rates. Conceptually, the PIU is the percent of the billable charges that are interstate. In some cases, the jurisdiction can be determined with certainty from the information recorded on the switch routing the call, and in that case, a PIU is unnecessary. In other cases, however, the jurisdiction cannot be determined from the recording, and a PIU is required to bill the usage to the correct jurisdiction. BellSouth believes that the Debtors are incorrectly calculating the split between interstate and intrastate calls (i.e., the PIU factor) resulting in the Debtors underpaying for access to BellSouth's telephone lines. In the BellSouth Actions, BellSouth alleges that the Debtors improperly determined the PIU factor for calls made pre-petition and continue to do so (the "PIU Claims").

12. As of the Petition Date, the BellSouth Actions that arose prior to the Petition Date were automatically stayed pursuant to section 362 of the Bankruptcy Code.

### **BellSouth and WorldCom Negotiations**

13. Prior to the Petition Date, BellSouth and the Debtors entered into discussions in an attempt to resolve various disputes regarding the Services. These discussions continued post-petition, and were made part of the discussions contemplated pursuant to the setoff procedures of the Court's Amended Order Pursuant to Sections 105(a) and 366(b) of the Bankruptcy Code Authorizing WorldCom to Provide Adequate Assurance to Utility Companies entered on October 2, 2002 (the "Adequate Assurance Order"), which provided:

ORDERED that WorldCom and the Utility Companies that are both creditors to, and debtors of, WorldCom, shall negotiate in good faith to establish procedures for the mutual setoff of payments for prepetition services ... and for the mutual setoff of payments for postpetition services ....

See Adequate Assurance Order at p. 5, a copy of which is attached hereto as **Exhibit "E"**. Prior to completing those discussions, and without notice to BellSouth, the Debtors commenced the WorldCom Actions.

### **The WorldCom Actions**

14. Despite the negotiation efforts described above, on or about December 17, 2002, MCIMetro Access Transmission Services, LLC ("MCImetro") and MCI WorldCom Communications, Inc. ("MCI") commenced an action (the

“Georgia Action”) against BellSouth before the Georgia Public Service Commission, Docket No. 16332-U. See Exhibit “F” attached hereto. Thereafter, on January 29, 2003, MCI Metro and MCI commenced an action (the “Florida Action”) against BellSouth before the Florida Public Service Commission, Docket No. 030103-TP. See Exhibit “G” attached hereto. Thereafter, on January 30, 2003, MCImetro commenced an action (the “North Carolina Action”) against BellSouth before the North Carolina Utilities Commission, Docket No. P-55, Sub 1399. See Exhibit “H” attached hereto. Thereafter, on February 4, 2003, Brooks Fiber Communications of Mississippi, Inc. commenced an action (the “Mississippi Action”) against BellSouth before the Mississippi Public Service Commission, Docket No. 2003-AD-074. See Exhibit “I” attached hereto.

15. The Debtors have informed BellSouth that they plan on commencing similar actions (and collectively with the Georgia Action, the North Carolina Action, the Mississippi Action and the Florida Action, the “WorldCom Actions”) against BellSouth before the PSCs in each of the nine states in the Operating Region where the Debtors transact business with BellSouth. Each of the plaintiffs in the WorldCom Actions is a WorldCom Debtor party (the “Debtor Parties”).

16. In the WorldCom Actions, the Debtor Parties allege breaches of the Interconnection Agreements and seek specific performance and monetary awards in the form of refunds or credits. The Debtor Parties assert that BellSouth has and continues to improperly charge the Debtor Parties for certain high-capacity circuits. The Debtor Parties allege that BellSouth should be charging rates set forth in the

Interconnection Agreements for unbundled network elements rather than rates set forth in BellSouth's tariffs for special access circuits. The allegations relate to the use of BellSouth's circuits both pre-petition and post-petition.

### **The Debtor Parties' Schedules**

17. On November 4, 2003, the Debtors filed their Schedule of Liabilities (the "Schedules").<sup>1</sup> Among the Schedules filed by the Debtors was Schedule "F" reflecting the name of all creditors that hold unsecured non-priority claims against the Debtors and the amount of such claim as reflected in the Debtors' books and records.

18. BellSouth is included in the Debtor Parties' Schedules and the Debtors admit that BellSouth is owed the following liquidated, non-contingent and undisputed amounts for services provided to the Debtor Parties by BellSouth prior to the Petition Date (the "BellSouth Pre-Petition Claims"): (a) MCImetro Access Transmission Services LLC - \$8,267,876.00; (b) MCI WorldCom Communications, Inc. - \$1,602,789.00; (c) Brooks Fiber Communications of Mississippi, Inc. - \$101,892.00. Accordingly, WorldCom admits that, as of the Petition Date, BellSouth

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<sup>1</sup> By Order, dated July 23, 2002, this Court extended the Debtors' initial 15-day period to file its schedules and statements of financial affairs to November 4, 2002. Pursuant to further order of this Court, dated October 29, 2002, the deadline for filing the completed schedules was extended through January 31, 2003. Thereafter on January 9, 2003, the deadline was further extended to March 31, 2003.

was owed a minimum of approximately ten million dollars on account of the BellSouth Pre-Petition Claims.<sup>2</sup>

### **Summary of Relief Requested**

19. BellSouth requests that the Court enter an Order:

a) granting BellSouth relief from the automatic stay, pursuant to section 362(d)(1) of the Bankruptcy Code, to assert limited rights of setoff ("Limited Setoff") in the WorldCom Actions to the extent of (i) the BellSouth Pre-Petition Claims; and (ii) the amounts to be liquidated in the BellSouth Actions or the Counterclaims; and

b) in furtherance of the Limited Setoff, granting BellSouth relief from the automatic stay, pursuant to section 362(d)(1) of the Bankruptcy Code, to allow BellSouth to (i) commence or continue with the BellSouth Actions; or (ii) assert the PIU Claims as Counterclaims in the WorldCom Actions; or

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<sup>2</sup> By restating the information contained in the Debtor Parties' Schedules, BellSouth does not intend to waive or otherwise impair its right to dispute, contest or object to any and all amounts contained therein by, among other things, filing a proof of claim in the Debtor Parties' cases. The description of the BellSouth Pre-Petition Claims is merely intended to demonstrate the minimum amount that BellSouth is owed on account of pre-petition services provided to the Debtor Parties. In addition, due to the complex relationship between the Debtors and BellSouth, BellSouth is still in the process of identifying which Debtors are liable for BellSouth's claims. Nothing contained herein should be construed as a waiver of any such issues or any of BellSouth's rights, including, but not limited to, seeking further relief regarding setoff.

c) in the alternative, conditioning the continuation of the stay on agreement by the Debtor Parties to a stipulation to refrain from executing on or otherwise collecting any award in the WorldCom Actions until BellSouth's setoff rights have been determined by a final order, including the resolution of BellSouth's claims.

20. By way of this Motion, BellSouth is not seeking relief to immediately effectuate a setoff. Rather, BellSouth is seeking relief to assert such right and to have such right adjudicated in the WorldCom Actions.

### **ARGUMENT**

#### **A. BellSouth's Limited Setoff is Appropriate.**

21. At this time, BellSouth seeks to assert the Limited Setoff in the WorldCom Actions in two limited situations: (a) to the extent of the BellSouth Pre-Petition Claims; and (b) to the extent that both BellSouth and the Debtor Parties each receive awards on their asserted claims, in which case, the awards should be netted by the various state PSCs in each of the WorldCom Actions before the various PSCs.

22. As an initial matter, when setoff is asserted in defense to a debtor's own complaint, many courts permit such defense without need of obtaining prior relief from the stay. See, e.g., In re The Charter Company, 86 B.R. 280 (Bankr. M.D. Fla. 1988); In re Fulghum Constr. Corp., 23 B.R. 147 (Bankr. M.D. Tenn. 1982); Butz v. Chanpain Landmark, Inc., 33 B.R. 926 (Bankr. S.D. Ohio 1983). However, out of an abundance of caution and due deference to this Court, BellSouth believes that it is appropriate to seek a ruling on relief from the automatic stay prior to



asserting the Limited Setoff, or a ruling that the stay is not applicable to asserting the Limited Setoff.

23. Under section 553 of the Bankruptcy Code, setoff will be permitted where, as here, the following conditions are met: (1) the creditor's claim against the debtor arose pre-petition; (2) the creditor also owes a debt to the debtor that arose pre-petition; (3) the claim and debt are "mutual;" and (4) the claim and debt are valid and enforceable under state law. See id.; see also Collier on Bankruptcy ¶ 553.03[3][b], p. 553-58 (15th rev. ed.).

24. Relief from the automatic stay should be granted, for cause, when a creditor has a state law right of setoff and the requirements of section 553 are satisfied. See In re Nuclear Imaging Sys., Inc., 260 B.R. 724, 730 (Bankr. E.D. Pa. 2000) ("Courts have generally concluded that the existence of mutual obligations subject to setoff constitutes sufficient 'cause' to meet the creditor's initial evidentiary burden in seeking relief from the automatic stay."); In re Firestone, 179 B.R. 148, 148 (Bankr. D. Neb. 1995) ("A right to setoff under § 553 establishes a prima facie case of cause to lift the automatic stay.") (emphasis in original).

25. At this time, BellSouth is not seeking to apply any setoff that is unliquidated, disputed or otherwise contingent. Indeed, with respect to the BellSouth Pre-Petition Claims, it is undisputed that they arose pre-petition, that the Debtors owe these amounts to BellSouth and that they are valid under applicable state law. Accordingly, with respect to the Bellsouth Pre-Petition Claims, setoff is proper.

26. Furthermore, with respect to the PIU Claims, only after the various state PSCs issue their rulings in the various BellSouth Actions and WorldCom

Actions will setoff be applicable to the extent that both BellSouth and the Debtors receive countervailing awards. Thus, at this time, BellSouth will not be seeking to setoff unliquidated amounts or amounts that have not been admitted or validated by a judicial body. Rather, the Limited Setoff will occur in a controlled environment, supervised by the various state PSCs, and only to the extent of the actual awards received in the Actions. In that situation, the elements of setoff will be satisfied by default. That explains why courts in other jurisdictions have ruled that relief from stay is not necessary to assert a right of setoff in an action commenced by a debtor. Thus, at this time, relief from the automatic stay should be granted to BellSouth merely to assert its Limited Setoff rights in the WorldCom Actions, or a ruling should be made that the automatic stay is inapplicable to asserting the Limited Setoff.

**B. Relief from the Stay to Continue with the BellSouth Actions or Assert the PIU Claims as Counterclaims is Appropriate.**

27. In order to properly assert the Limited Setoff, BellSouth also seeks relief from the automatic stay, pursuant to section 362(d)(1) of the Bankruptcy Code, to allow BellSouth to (i) commence or continue with liquidation of the BellSouth Actions; or (ii) assert the PIU Claims as Counterclaims in the WorldCom Actions.

**(1) The Factors For Relief From Stay**

28. Section 362(d) of the Bankruptcy Code provides that, on request of a party in interest and after notice and a hearing, the Court shall terminate, annul, modify or condition the automatic stay for cause. While cause is not defined in the

Bankruptcy Code, the Second Circuit Court of Appeals has held that courts should consider with appropriate weight each of the following applicable factors:

(a) whether relief would result in a partial or complete resolution of the issue; (b) the lack of any connection with or interference with the bankruptcy case; (c) whether the other proceeding involves the debtor as a fiduciary; (d) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (e) whether the debtor's insurer has assumed full responsibility for defending it; (f) whether the action primarily involves third parties; (g) whether litigation in another forum would prejudice the interests of other creditors; (h) whether the judgment claim arising from the other action is subject to equitable subordination; (i) whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (j) the interest of judicial economy and the expeditious and economical resolution of litigation; (k) whether the parties are ready for trial in the other proceeding; and (l) the impact of the stay on the parties and the balance of harms.

See In re Sonnox Industries, Inc., 907 F.2d 1280, 1286 (2d Cir. 1990).

29. The Second Circuit, however, makes clear the application of the Sonnox factors is not a mechanical one. Schneiderman v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 110 (2d Cir. 2002). In making its determination, a court should consider only the above factors that are relevant and assign appropriate weight to each factor considered. In re Burger Boy's, 183 B.R. 682, 688 (S.D.N.Y. 1994).

30. Here, the applicable Sonnox factors weigh heavily in favor of relief from the stay to allow BellSouth to commence or continue with liquidation of the BellSouth Actions or to assert the PIU Claims as Counterclaims in the WorldCom Actions.

**(2) A Specialized Tribunal Exists**

31. Relief is appropriate in this case because a specialized tribunal with the necessary expertise has been established to hear and adjudicate telecommunications claims of the nature set forth in the WorldCom Actions and the BellSouth Actions. Indeed, pursuant to applicable state law, the state PSCs have jurisdiction to review, comment on and approve agreements such as the Interconnection Agreement, and to enforce tariffs, which requires highly technical and specialized knowledge regarding the telecommunications industry.<sup>3</sup> Furthermore, pursuant to applicable state law, the PSCs have jurisdiction to decide disputes such as the WorldCom Actions and the BellSouth Actions.<sup>4</sup>

32. While BellSouth is confident with this Court's ability to, if necessary, adjudicate the BellSouth Actions, given the Debtor Parties' post-petition intent to proceed with the WorldCom Actions before the various state PSCs, BellSouth should be allowed to commence or continue with the BellSouth Actions or the Counterclaims before the same specialized commission.

33. Furthermore, because of the PSCs' specialized background and skills, relief from the automatic stay will ensure that the disputes can be resolved cost effectively and quickly, with a minimum of delay and burden to all concerned.

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<sup>3</sup> See, e.g., Telecommunications Act of 1996, 47 U.S.C. § 252(e) (“[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission”); MISS CODE ANN. §§ 77-3-2(2), 77-3-5; GA. CODE ANN. §§ 46-2-21, 46-2-20(b), 46-2-91(a) and (b), 46-5-168 and 46-5-162(8); ALA. CODE § 37-1-1; and LA. CONST. art. I, § 21.

<sup>4</sup> Id.

See, e.g., In re Bison Resources, Inc., 230 B.R. 611, 617 (Bankr. N.D.Okla. 1999) (When determining whether to grant relief from the automatic stay for cause, the bankruptcy court should consider specialized expertise of the non-bankruptcy forum); Matter of Bell, 215 B.R. 266, 275-276 (Bankr. N.D.Ga. 1997) (Where relief would permit resolution of uniquely state law questions which necessarily must be decided as part of case's administration, "cause" will exist to lift the automatic stay for that limited purpose); In re Lahman Mfg. Co., Inc., 31 B.R. 195, 198-199 (Bankr. D.S.D. 1983) (situations warranting modification of stay to allow litigation to proceed in another forum are where matter in controversy is governed exclusively by unsettled state law or where specialized tribunal has been established for particular causes of action and that tribunal has expertise to hear such cases).

34. A cursory review of the WorldCom Actions evidences that even the Debtor Parties believe that the various state PSCs are the proper judicial bodies to decide such matters. See, e.g., Exhibit "F" at ¶ 4-6. The Debtor Parties would not have commenced such actions there if they thought otherwise.

35. In addition, certain of BellSouth's claims in the BellSouth Actions relate to Services provided post-petition by BellSouth to the Debtor Parties. Indeed, these post-petition Services provided an undeniable benefit to the Debtors' estates for which the Debtors' are liable. Accordingly, BellSouth need not seek relief from the automatic stay to commence an action with respect to these post-petition claims. See In re Chateaugay Corp., 86 B.R. 33 (S.D.N.Y. 1987) (holding that section 362 does not apply to causes of action that arise after bankruptcy petition); In re Trans World Airlines, 275 B.R. 712, 724 (Bankr. D. Del. 2002) (stating that

claim for administrative expense will arise where estate was provided with a benefit pursuant to pre-petition contract). However, without relief from the automatic stay with respect to the pre-petition BellSouth Actions, BellSouth faces the prospect of having to litigate the same issues numerous times.

36. It makes no sense for this Court, in the midst of all else that is on its docket, to have to decide the pre-petition BellSouth Actions when the post-petition BellSouth Actions will be decided by the various state PSCs. See, e.g., Pursifull v. Eakin, 814 F.2d 1501, 1506 (10<sup>th</sup> Cir. 1987) (Sufficient cause existed for lifting of stay because there was pending state court proceeding dealing with same issues which were best decided by state courts). Indeed, this likely would require that this Court needlessly immerse itself in the detailed terms of a complicated commercial relationship and the intricacies of pricing in the telecommunications market in order to decide a prepetition, non-core dispute.

37. Therefore, relief from the automatic stay is appropriate in this case to allow BellSouth to commence and proceed with the pre-petition BellSouth Actions or the Counterclaims and to allow the various state PSCs to adjudicate these specialized telecommunications claims.

**(3) No Interference with Bankruptcy Case**

38. The relief sought herein would in no way interfere with these bankruptcy cases. It is well recognized that “[t]he principal purpose of the automatic stay is to avoid diminution of the bankruptcy’s assets.” In re Larkham, 31 B.R. 273, 276 (Bankr. D. Vt. 1983). The limited relief that BellSouth seeks at this time in no way would diminish the assets of the bankruptcy estate. Indeed, BellSouth does not

seek to execute or otherwise collect on any judgment that it receives in the BellSouth Actions other than to the extent of the Limited Setoff, which as explained above, would be limited to (i) the BellSouth Pre-Petition Claims and (ii) countervailing awards issued in each of the WorldCom Actions. Furthermore, a prompt resolution of the BellSouth Actions and the WorldCom Actions (collectively, the "Actions") will have the added benefit of allowing important issues to be decided in a timely fashion as not to delay the Debtors' reorganization efforts. Moreover, the Debtors voluntarily commenced the WorldCom Actions post-petition outside of the Bankruptcy Court, thus evaporating any argument that all issues must be resolved in the Bankruptcy Court to avoid placing a time and financial burden on the Debtors by having to litigate claims outside of the Bankruptcy Court. Therefore, relief from the automatic stay is appropriate in this case.

**(4) *Impact of the Stay on the  
Parties and the Balance of Harms***

39. Perhaps the most important factor here is the permanent and substantial harm BellSouth will suffer if the stay is not modified to allow it to commence or continue with the BellSouth Actions (or assert the PIU claims as Counterclaims) at this time. The Debtor Parties have it within their power to avoid this harm by agreeing to an appropriate stipulation. The consequences to BellSouth from this position are overwhelming and will be tantamount to a denial of due process if relief from the stay is not granted to allow BellSouth to avoid that harsh result.

40. Most significantly, if BellSouth is not granted relief from the stay to liquidate its PIU Claims either by commencing or continuing the BellSouth

Actions or by asserting such claims as Counterclaims in the WorldCom Actions, BellSouth may forever lose its right to assert portions of the Limited Setoff. Indeed, if the Debtor Parties receive an award in the WorldCom Actions and are permitted to execute upon such award, BellSouth will be in a race with the Debtor Parties to obtain setoff rights prior to the Debtor Parties enforcing the award. Essentially, BellSouth will have rights that existed as of the Petition Date forever stripped without a judicial determination of their validity. Such a result is perverse and contrary to the underlying policies of the stay. See In re Moss, 270 B.R. 333, 342 (Bankr. W.D.N.Y. 2001) (“[T]he protections afforded by the Bankruptcy Code, such as the automatic stay, operate as a shield and not a sword.”); In re Skeen, 248 B.R. 312, 321 (Bankr. E.D. Tenn. 2000) (“The automatic stay afforded by section 362 is intended to be a shield protecting debtors and their estates, and should not be used as a sword for their enrichment.”).

41. It should be noted that this problem is a product of the Debtors’ own creation. Indeed, the Debtors’ commenced the WorldCom Actions post-petition and voluntarily chose to liquidate certain pre-petition and post-petition claims against BellSouth outside of the Bankruptcy Court. Simultaneously, however, the Debtors have invoked the powers of the automatic stay to prevent BellSouth from protecting itself from irreparable harm by commencing or continuing with the BellSouth Actions or asserting the Counterclaims in the WorldCom Actions. See In re Wedtech Corp., 87 B.R. 279, 290 (Bankr. S.D.N.Y. 1988) (lifting stay to allow non-debtor party to counterclaim against debtor because “were the stay not to be lifted...[the non-debtor party] would never be able to fix its claim, a result which is highly inequitable”);



In re Saxon Indus., Inc., 43 B.R. 64, 67 (Bankr. S.D.N.Y. 1984) (in holding that the automatic stay should be lifted, the Court stated that “where...a debtor brings a lawsuit and then invokes the automatic stay to prevent the defendant from asserting counterclaims, the Second Circuit has stated that ‘the situation warrants a very thoughtful scrutiny’”) (citations omitted).

42. In contrast, the potential harm to the Debtor Parties is far less substantial, if any. If the relief requested in this Motion is granted, the Debtor Parties merely will be required to adhere to the requirements of the Bankruptcy Code and applicable state law. Therefore, relief from the automatic stay is appropriate in this case.

C. **In the Alternative, an Agreement to Refrain from Executing on any Award is Appropriate.**

43. In the event the Court determines that relief from the automatic stay is not appropriate in this instance, the Court should use its authority, in the alternative, to condition continuation of the stay on an agreement by the Debtor Parties to refrain from executing or otherwise collecting any award until BellSouth’s setoff rights have been determined by final order, including the resolution of BellSouth’s claims. Requiring that the Debtor Parties either agree to preserve the status quo or give up the benefits of the stay is an appropriate exercise of the Court’s powers.

44. Under section 362(d)(1) of the Bankruptcy Code, bankruptcy courts have the authority, upon a showing of cause, not only to terminate or modify the stay, but also to place appropriate conditions on its continuation. 11 U.S.C

§ 362(d)(1). Indeed, the Second Circuit has recognized that section 362 gives “bankruptcy courts...plastic powers to modify or condition [the] automatic stay so as to fashion the appropriate scope of relief.” E. Refractories Co., Inc. v. Forty Eight Insulations Inc., 157 F.3d 169, 172 (2d Cir. 1998); see also Superior Paint Mfg. Co., Inc. v. Lopez-Soto (In re Lopez-Soto), 764 F.2d 23 (1st Cir. 1985) (bankruptcy court has “adequate powers...to impose conditions upon those who wish to keep the stay aimed at holding the moving party harmless”).

45. Here, the automatic stay places BellSouth in a position where, absent relief, it faces a material risk of effectively losing certain of its setoff rights forever. That result, if permitted, would turn on its head the fundamental tenet of bankruptcy law that the stay should not harm creditors but merely preserve the status quo while allowing the debtor breathing room. In re Policy Realty Corp., 242 B.R. 121, 129 (S.D.N.Y. 1999) (it is “well-established that the automatic stay provision of §362(a) is intended to preserve the status quo as of the date of commencement of bankruptcy proceedings.”), aff’d, 213 F.3d 626 (2d Cir. 2000). By not agreeing to relief from stay to allow BellSouth to commence or continue with the PIU Claims to fully assert the Limited Setoff while, at the same time, refusing to agree to the status quo, the Debtor Parties propose to use the protections of the Bankruptcy Code, not as the shield it was intended to be, but as a sword. This behavior clearly is inappropriate.

46. Conditioning the Debtor Parties continued enjoyment of the benefits of the automatic stay on its willingness to ensure that BellSouth is not

harmful from the delay occasioned by the stay is fair, reasonable and proper and is consistent with the underlying purposes of the Bankruptcy Code.

**Waiver of Accompanying Memorandum of Law**

47. Because applicable authorities have been set forth herein, BellSouth respectfully requests that the Court waive and dispense with the requirement of an accompanying memorandum as set forth in Rule 9013-1(b) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York.

**WHEREFORE**, BellSouth respectfully requests the Court enter an Order, substantially in the form attached hereto as **Exhibit "J"**: (a) granting BellSouth relief from the automatic stay, pursuant to section 362(d)(1) of the Bankruptcy Code, to assert the Limited Setoff in the WorldCom Actions; and, in furtherance of the Limited Setoff, (b) granting BellSouth relief from the automatic stay, pursuant to section 362(d)(1) of the Bankruptcy Code, to (i) commence or continue with the BellSouth Actions or (ii) assert the PIU Claims as Counterclaims in the WorldCom Actions; or, in the alternative (c) conditioning the continuation of the stay on agreement by the Debtor Parties to a stipulation to refrain from executing on

any judgment or award entered in the Debtor Parties' favor in the WorldCom Actions until BellSouth's setoff rights have been determined by a final order, including the resolution of BellSouth's claims; and (d) such other and further relief as the Court deems necessary and appropriate.

Dated: February 18, 2003

/s/ Paul M. Rosenblatt

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KILPATRICK STOCKTON LLP  
Paul M. Rosenblatt (PR-6300)  
Robbin S. Rahman (GA 592151)  
1100 Peachtree Street, Suite 2800  
Atlanta, Georgia 30309  
(404) 815-6321 (telephone)  
(404) 541-3373 (fax)

COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, INC.

**EXHIBIT J**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----	X	
In re	:	
	:	Chapter 11
WORLD COM, INC., <u>et al.</u> ,	:	Case No. 02-13533 (AJG)
	:	
	:	(Jointly Administered)
Debtor.	:	
-----	X	

**ORDER GRANTING MOTION  
OF BELL SOUTH TELECOMMUNICATIONS, INC. FOR  
RELIEF FROM THE AUTOMATIC STAY OR ALTERNATIVE RELIEF**

Upon consideration of the Motion of BellSouth Telecommunications, Inc. for Relief from the Automatic Stay or Alternative Relief (the "Motion"), filed by BellSouth Telecommunications, Inc. ("BellSouth") on February 18, 2003, and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; the Court having reviewed the Motion and having heard the statements and considered the evidence introduced by the parties in support of and in opposition to the respective Motion; the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefore, it is **HEREBY ORDERED** as follows,

1. The Motion is granted as set forth herein.

2. The automatic stay arising in these chapter 11 cases, pursuant to section 362(a) of title 11, United States Code, is modified for the purpose of:

(a) allowing BellSouth to assert the Limited Setoff in the WorldCom Actions to the extent of (i) the BellSouth Pre-Petition Claims and (ii) the PIU Claims; and (b) allowing BellSouth to commence or continue with the BellSouth Actions, or assert the PIU Claims as Counterclaims in the WorldCom Actions.

3. The automatic stay remains in effect for all other purposes.

4. Nothing in this Order shall prejudice the parties' respective positions as to any issue in the Actions.

Dated: \_\_\_\_\_  
New York, New York

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE